Department of Justice

**STATEMENT**

**OF**

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**ASSOCIATE ATTORNEY GENERAL**

**BEFORE THE**

**COMMITTEE ON INDIAN AFFAIRS**
**UNITED STATES SENATE**

**LEGISLATIVE HEARING ON**
**SENATE BILLS 872, 1192, AND 1763**

**PRESENTED ON**

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**Testimony of**
**Thomas J. Perrelli**
**Associate Attorney General**

**Before the**
**Committee on Indian Affairs**
**United States Senate**

**For a Legislative Hearing on**
**Senate Bills 872, 1192, and 1763**

**Thursday, November 10, 2011**

Chairman Akaka, Vice Chairman Barrasso, and members of the Committee:

Thank you for inviting me to testify today on Senate Bill 1763, the Stand Against Violence and Empower Native Women Act, also known as the SAVE Act. The SAVE Act addresses a critically important issue on which the Department of Justice has placed a high priority: combating violence against women in tribal communities. As you know, I testified on that issue before this Committee in July, when I described the Department's comprehensive discussions, including formal consultations with Indian tribes, about how best to protect Native women from the unacceptable levels of violence we are witnessing in Indian country. We are very pleased today to see the introduction of the SAVE Act, and we commend you, Chairman Akaka, as well as your many colleagues who have joined you in cosponsoring this historic legislation.

The Epidemic of Violence Against Native Women

The problems addressed by the SAVE Act are severe. Violence against Native women has reached epidemic rates. One regional survey conducted by University of Oklahoma researchers showed that nearly three out of five Native American women had been assaulted by their spouses or intimate partners. According to a nationwide survey funded by the National Institute of Justice (NIJ), one third of all American Indian women will be raped during their lifetimes. And an NIJ-funded analysis of death certificates found that, on some reservations, Native women are murdered at a rate more than ten times the national average. Tribal leaders, police officers, and prosecutors tell us of an all-too-familiar pattern of escalating violence that goes unaddressed, with beating after beating, each more severe than the last, ultimately leading to death or severe physical injury.

Something must be done to address this cycle of violence. For a host of reasons, the current legal structure for prosecuting domestic violence in Indian country is inadequate to prevent or stop this pattern of escalating violence. Federal law-enforcement resources are often far away and stretched thin. And Federal law does not provide the tools needed to address the types of domestic or dating violence that elsewhere in the United States might lead to convictions and sentences ranging from approximately six months to five years — precisely the sorts of prosecutions that can respond to the early instances of escalating violence against spouses or intimate partners and stop it.

Tribal governments — police, prosecutors, and courts — should be essential parts of the response to these crimes. But under current law, they lack the authority to address many of these crimes. Until recently, no matter how violent the offense, tribal courts could only sentence Indian offenders to one year in prison. Under the Tribal Law and Order Act of 2010 (TLOA), landmark legislation enacted last year in no small part due to the efforts of this Committee, tribal courts can now sentence Indian offenders for up to three years per offense, provided defendants are given certain procedural protections, including legal counsel. But tribal courts have no authority at all to prosecute a non-Indian, even if he lives on the reservation and is married to a tribal member. Tribal police officers who respond to a domestic-violence call, only to discover that the accused is non-Indian and therefore outside the tribe's criminal jurisdiction, often mistakenly believe they cannot even make an arrest. Not surprisingly, abusers who are not arrested are more likely to repeat, and escalate, their attacks. Research shows that law enforcement's failure to arrest and prosecute abusers both emboldens attackers and deters victims from reporting future incidents.

In short, the jurisdictional framework has left many serious acts of domestic violence and dating violence unprosecuted and unpunished.

The Department of Justice's Efforts to Combat This Violence

The Department of Justice has made, and is continuing to make, strong efforts to investigate and prosecute domestic-violence cases in Indian country, including, among other things:

- Deploying 28 new Assistant U.S. Attorneys whose sole mission is to prosecute crime in Indian country.
- Instructing U.S. Attorneys to prioritize the prosecution of crimes against Indian women and children.
- Establishing new domestic-violence training programs for law-enforcement officials and prosecutors alike.
- Creating a Violence Against Women Federal/Tribal Prosecution Task Force to develop "best practices" for both Federal and tribal prosecutors.

But we believe that more needs to be done.

The Views of Tribal Leaders and Experts, and the Department's Response

The Department of Justice has consulted extensively with Indian tribes about these issues, including at the Attorney General's listening conference in 2009, the tribal consultations we held on TLOA implementation in 2010, our annual tribal consultations under the Violence Against Women Act, and a series of tribal consultations focused on potential legislative reforms in June of this year. These consultations — like the Justice Department's other work in this area, especially in the wake of the TLOA's enactment last year — have involved close coordination across Federal agencies, including the Departments of the Interior and of Health and Human Services.

The consensus that emerged from these tribal consultations was the need for greater tribal jurisdiction over domestic-violence cases. Specifically, tribal leaders expressed concern that the crime-fighting tools currently available to their prosecutors differ vastly, depending on the race of the domestic-violence perpetrator. If an Indian woman is battered by her Indian husband or boyfriend, then the tribe typically can prosecute him. But absent an express Act of Congress, the tribe cannot prosecute a violently abusive husband or boyfriend if he is non-Indian. And recently, one Federal court went so far as to hold that, in some circumstances, a tribal court could not even enter a civil protection order against a non-Indian husband.

Faced with these criminal and civil jurisdictional limitations, tribal leaders repeatedly have told the Department that a tribe's ability to protect a woman from violent crime should not depend on her husband's or boyfriend's race, and that it is immoral for an Indian woman to be left vulnerable to violence and abuse simply because the man she married, the man she lives with, the man who fathered her children, is not an Indian.

The concerns raised by tribal leaders and experts led the Department to propose new Federal legislation on July 21 of this year. The response to the Department's proposal from persons of all backgrounds and experiences, including state, local, and tribal law-enforcement officials, has been overwhelmingly positive.

The SAVE Act Addresses Three Key Areas that Are Ripe for Legislative Reform

The SAVE Act's Title II incorporates the Department of Justice's proposal and thus addresses precisely the concerns that tribal leaders and experts have repeatedly expressed to us. Specifically, this title of the Act fills three major legal gaps, involving tribal criminal jurisdiction, tribal civil jurisdiction, and Federal criminal offenses.

*First*, the patchwork of Federal, state, and tribal criminal jurisdiction in Indian country has made it difficult for law enforcement and prosecutors to adequately address domestic violence — particularly misdemeanor domestic violence, such as simple assaults and criminal

violations of protection orders. The SAVE Act recognizes certain tribes' power to exercise concurrent criminal jurisdiction over domestic-violence cases, regardless of whether the defendant is Indian or non-Indian. Fundamentally, this legislation builds on what this Committee did in the Tribal Law and Order Act. The philosophy behind TLOA was that tribal nations with sufficient resources and authority will be best able to address violence in their own communities; it offered additional authority to tribal courts and prosecutors if certain procedural protections were established.

*Second*, at least one Federal court has opined that tribes lack civil jurisdiction to issue and enforce protection orders against non-Indians who reside on tribal lands. That ruling undermines the ability of tribal courts to protect victims. Accordingly, the SAVE Act confirms the intent of Congress in enacting the Violence Against Women Act of 2000 by clarifying that tribal courts have full civil jurisdiction to issue and enforce certain protection orders involving any persons, Indian or non-Indian.

*Third*, Federal prosecutors lack the necessary tools to combat domestic violence in Indian country. The SAVE Act provides a one-year offense for assaulting a person by striking, beating, or wounding; a five-year offense for assaulting a spouse, intimate partner, or dating partner, resulting in substantial bodily injury; and a ten-year offense for assaulting a spouse, intimate partner, or dating partner by strangling or suffocating.

Title II of the SAVE Act, which is the Act's core, fills these three holes in the law. In addition, Title I of the SAVE Act reforms grant programs aimed to help Native victims, strengthens the Department's consultation process, and ensures that our program of research includes violence against Alaska Native women. And Title III amends TLOA to provide a much-needed one-year extension for the Indian Law and Order Commission, which Congress created to conduct a comprehensive study of law enforcement and criminal justice in tribal communities.

Tribal Jurisdiction over Crimes of Domestic Violence

Section 201 of the SAVE Act recognizes certain tribes' concurrent criminal jurisdiction to investigate, prosecute, convict, and sentence both Indians and non-Indians who assault Indian spouses, intimate partners, or dating partners, or who violate protection orders, in Indian country. Without impinging on any other government's jurisdiction, this bill recognizes that a tribe has concurrent jurisdiction over a tightly defined set of crimes committed in Indian country: domestic violence, dating violence, and violations of enforceable protection orders. To the extent those crimes can be prosecuted today by Federal or State prosecutors, that would not be changed by the SAVE Act.

Similar to TLOA, this additional tribal authority under the SAVE Act would be available only to those tribes that guarantee sufficient protections for the rights of defendants. Tribes exercising this statutorily recognized jurisdiction over crimes of domestic violence would be

required to protect a robust set of rights, similar to the rights protected in State-court criminal prosecutions. This approach thus builds on the Indian Civil Rights Act of 1968, as amended in 1986 and 1990, and on TLOA. Tribes that choose not to provide these protections would not have this additional authority.

Not surprisingly, expanding tribal criminal jurisdiction to cover more perpetrators of domestic violence would tax the already scarce resources of most tribes that might wish to exercise this jurisdiction under the SAVE Act. Therefore, the Act authorizes grants to support these tribes by strengthening their criminal-justice systems, providing indigent criminal defendants with licensed defense counsel at no cost to those defendants, ensuring that jurors are properly summoned, selected, and instructed, and according crime victims' rights to victims of domestic violence.

Tribal Protection Orders

Section 202 of the SAVE Act addresses tribal civil jurisdiction. Specifically, it confirms the intent of Congress in enacting the Violence Against Women Act of 2000 by clarifying that every tribe has full civil jurisdiction to issue and enforce certain protection orders against both Indians and non-Indians. That would effectively reverse a 2008 decision from a Federal district court in Washington State, which held that an Indian tribe lacked authority to enter a protection order for a nonmember Indian against a non-Indian residing on non-Indian fee land within the reservation.

Amendments to the Federal Assault Statute

Section 203 of the SAVE Act involves Federal criminal offenses rather than tribal prosecution. In general, Federal criminal law has not developed over time in the same manner as State criminal laws, which have recognized the need for escalating responses to specific acts of domestic and dating violence. By amending the Federal Criminal Code to make it more consistent with State laws in this area where the Federal Government (and not the State) has jurisdiction, the SAVE Act simply ensures that perpetrators will be subject to similar potential punishments regardless of where they commit their crimes. Specifically, the Act amends the Federal Criminal Code to provide a ten-year offense for assaulting a spouse, intimate partner, or dating partner by strangling or suffocating; a five-year offense for assaulting a spouse, intimate partner, or dating partner resulting in substantial bodily injury; and a one-year offense for assaulting a person by striking, beating, or wounding. All of these are in line with the types of sentences that would be available in State courts across the Nation if the crime occurred outside Indian country.

Existing Federal law provides a six-month misdemeanor assault or assault-and-battery offense that can be charged against a non-Indian (but not against an Indian) who commits an act of domestic violence against an Indian victim. (A similar crime committed by an Indian would fall within the exclusive jurisdiction of the tribe.) A Federal prosecutor typically can charge a

felony offense against an Indian or a non-Indian defendant only if the victim's injuries rise to the level of "serious bodily injury," which is significantly more severe than "substantial bodily injury."

So, in cases involving any of these three types of assaults — (1) assault by strangling or suffocating; (2) assault resulting in substantial (but not serious) bodily injury; and (3) assault by striking, beating, or wounding — Federal prosecutors today often find that they cannot seek sentences in excess of six months. And where both the defendant and the victim are Indian, Federal courts may lack jurisdiction altogether.

The SAVE Act increases the maximum sentence from six months to one year for an assault by striking, beating, or wounding, committed by a non-Indian against an Indian in Indian country. (Similar assaults by Indians, committed in Indian country, would remain within the tribe's exclusive jurisdiction.) Although the Federal offense would remain a misdemeanor, increasing the maximum sentence to one year would reflect the fact that this is a serious offense that often forms the first or second rung on a ladder to more severe acts of domestic violence.

Assaults resulting in substantial bodily injury sometimes form the next several rungs on the ladder of escalating domestic violence, but they too are inadequately covered today by the Federal Criminal Code. The SAVE Act fills this gap by amending the Code to provide a five-year offense for assault resulting in substantial bodily injury to a spouse, intimate partner, or dating partner.

And the SAVE Act also amends the Code to provide a ten-year offense for assaulting a spouse, intimate partner, or dating partner by strangling or suffocating. Strangling and suffocating — conduct that is not uncommon in intimate-partner cases — carry a high risk of death. But the severity of these offenses is frequently overlooked because there may be no visible external injuries on the victim. As with assaults resulting in substantial bodily injury, Federal prosecutors need the tools to deal with these crimes as felonies, with sentences potentially far exceeding the six-month maximum that often applies today.

Finally, section 203(e) of the SAVE Act simplifies the Major Crimes Act (which Federal prosecutors use to prosecute Indians for major crimes committed against Indian and non-Indian victims) to cover all felony assaults under section 113 of the Federal Criminal Code. That would include the two new felony offenses discussed above — assaults resulting in substantial bodily injury to a spouse, intimate partner, or dating partner; and assaults upon a spouse, intimate partner, or dating partner by strangling or suffocating — as well as assault with intent to commit a felony other than murder, which is punishable by a maximum ten-year sentence. Without this amendment to the Major Crimes Act, Federal prosecutors could not charge any of these three felonies when the perpetrator is an Indian. Under the SAVE Act, assault by striking, beating, or wounding remains a misdemeanor and is not covered by the Major Crimes Act.

Sections 201 and 203 of the SAVE Act work in tandem, enabling tribal investigators and prosecutors to focus on misdemeanors (including protection-order violations) and low-level felonies, regardless of the perpetrator's Indian or non-Indian status, while Federal investigators and prosecutors focus on the more dangerous felonies involving strangling, suffocation, and substantial bodily injury, again regardless of the perpetrator's Indian or non-Indian status.

We believe that enacting the SAVE Act will strengthen tribal jurisdiction over crimes of domestic violence, tribal protection orders, and Federal assault prosecutions. These measures, taken together, have the potential to significantly improve the safety of women in tribal communities and allow Federal and tribal law-enforcement agencies to hold more perpetrators of domestic violence accountable for their crimes.

I thank the Committee for its long-standing interest in these critically important issues, and I especially thank Chairman Akaka for drafting and introducing Senate Bill 1763, the Stand Against Violence and Empower Native Women Act.